IN THE COURT OF APPEALS OF IOWA

No. 0-091 / 09-0912
Filed March 10, 2010

SCOTT SWEERS,
Plaintiff-Appellant,

vs.

CRAIG WESTFALL, TAMARA WESTFALL,
and GRINNELL MUTUAL INSURANCE COMPANY,
Defendants-Appellees.

Appeal from the Iowa District Court for Johnson County, Marsha Bergan, Judge.

The plaintiff appeals following a jury verdict in his personal injury action, asserting evidentiary errors by the district court. **AFFIRMED.**

James K. Weston II of Tom Riley Law Firm, Iowa City, for appellant.

Jace Bisgard, Cedar Rapids, for appellee Grinnell Mutual Insurance Company.

J. Michael Weston, Cedar Rapids, for appellees Craig and Tamara Westfall.

Considered by Vaitheswaran, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

Scott Sweers appeals following a jury verdict in his personal injury action against Craig and Tamara Westfall, asserting evidentiary errors by the district court. Finding no abuse of discretion in the trial judge's rulings, we affirm.

I. Background Facts and Proceedings.

On the evening of March 30, 2006, Sweers, a student at Kirkwood Community College, was driving east on Kirkwood Boulevard in Iowa City. He was alone in his Audi, and was heading toward a fitness club that he used. A Jeep Liberty driven by Craig Westfall pulled north out off of a cross street that intersected Kirkwood Boulevard. Westfall intended to turn west on Kirkwood Boulevard. However, Westfall failed to see Sweers, and the left front bumper of his vehicle struck the passenger side of Sweers's smaller sedan. Photographs show that both right-side doors on Sweers's sedan were dented (the cost to repair Sweers's car was $3829), but no air bags in either vehicle deployed. Sweers was wearing his seatbelt. Sweers said he was okay at the time.

Sweers went home after the accident, but decided to seek medical treatment later that night. The emergency room notes indicate Sweers's "insurance agent recommended he come in for a check up." Sweers's mother testified that her son "didn't know yet if he was hurt," but she encouraged him to go to the hospital. Upon arrival, Sweers complained of mild right shoulder and neck pain. A CT scan of Sweers's right shoulder showed no acute fracture or dislocation, although evidence of an old injury to the shoulder and an old clavicle fracture was noted.

Sweers claims he continued to experience pain in his right shoulder, neck, and back thereafter. He consequently visited a chiropractor at the beginning of April. The patient intake form Sweers completed indicated he had broken his collar bone two years ago and dislocated his right shoulder three years ago. Sweers's pain improved after a month of treatment with the chiropractor, who noted he had regained a full range of motion and strength in his right shoulder. But the chiropractor did observe "an audible clicking with abduction and external rotation" of Sweers's right shoulder, which was described by Sweers "as not painful, just annoying."

Sweers sought further medical treatment in June, again complaining of right shoulder pain and "popping and clicking." The physician examined the CT scan of Sweers's right shoulder taken the night of the accident and noted it showed only the old injuries to his shoulder and clavicle. Sweers was given some range of motion and shoulder strengthening exercises to perform at home and instructed to return on an as-needed basis. For three months, Sweers did not seek further medical care.

In September, Sweers's right shoulder "popped" while he was reaching for a bottle of laundry detergent on a shelf in his closet. He felt "excruciating pain" and decided to seek additional medical treatment. He was referred to Dr. John Langland, a sports medicine and arthroscopy specialist later that month. Dr. Langland recommended arthroscopic surgery, which Sweers underwent in December. During the surgery, Dr. Langland found evidence that Sweers had dislocated his shoulder. He also discovered an anterior labral tear, a partial tear of Sweers's anterior glenohumeral ligament, and a partial rotator cuff tear. The

torn ligaments and rotator cuff were repaired, and within a year Sweers regained "the vast majority of his range of motion. His shoulder was stable; it wasn't slipping out of the socket. . . . He had good strength." Sweers continues to engage in weightlifting, although he contends he does not perform all the same exercises as before.

Sweers sued the Westfalls and his underinsured motorist carrier in February 2008. The claim against the carrier was severed. The Westfalls admitted negligence, and the case proceeded to a jury trial against them on the questions of causation and damages.

Prior to the trial, Sweers filed a motion in limine, requesting the district court to prohibit the Westfalls from presenting evidence regarding any alleged preexisting conditions. He also sought a ruling preventing the Westfalls from introducing the emergency room notes that stated Sweers sought medical treatment on the advice of his insurance agent. The court denied both requests. The jury returned a verdict in favor of Sweers, awarding him $5206 in damages.

Sweers appeals. He claims the district court erred in allowing the Westfalls to refer to "an alleged pre-existing condition when there was no expert testimony or other proof of the alleged injury." He additionally claims the court erred in allowing the Westfalls to refer to his "automobile insurance while prohibiting reference to [the Westfalls'] automobile insurance."

II. Scope and Standards of Review.

We review "standard claims of error in admission of evidence for an abuse of discretion." *Scott v. Dutton-Lainson Co.*, 774 N.W.2d 501, 503 (Iowa 2009). "Error may not be predicated upon a ruling which admits or excludes evidence

unless a substantial right of the party is affected." *Id.*; *see also* Iowa R. Evid. 5.103.

III. Discussion.

A. Evidence of Preexisting Condition.

Sweers claims the district court erred in admitting evidence regarding his prior right shoulder dislocation. He contends there was no substantial evidence of this injury, since the Westfalls had no medical records or medical testimony concerning it. We disagree with this argument. Sweers self-reported this previous injury to his chiropractor, providing it on a form that asked about "car accidents, falls or serious injuries." While Sweers later testified at trial that he did not "know" whether he had suffered a shoulder dislocation after crashing his bike in Minnesota in 2003, and that this was "just based off what the doctor said to me when I saw him," the jury was entitled to consider what Sweers stated on the form and give it such weight as it deserved. This was especially true because Sweers was unable to provide the hospital where he had been treated, and thus the Westfalls could not obtain the actual medical records from that accident. Furthermore, Dr. Langland testified that the shoulder injuries he treated surgically in December 2006 "could have resulted from a dislocation of the shoulder two or three years before."

Sweers tries to draw analogies to two prior supreme court decisions, *Sleeth v. Louvar*, 659 N.W.2d 210 (Iowa 2003), and *Greenwood v. Mitchell*, 621 N.W.2d 200 (Iowa 2001). However, both of the prior decisions involved jury instructions, not the admissibility of evidence. In *Sleeth*, the supreme court held that the jury should not be instructed regarding the plaintiff's inability to recover

for preexisting pain or disability (i.e., the jury should not be given an aggravation instruction) unless there is "proof of a preexisting disability—as opposed to a mere preexisting condition." 659 N.W.2d at 215. That case has no bearing here. The Westfalls did not claim Sweers had a prior disability, and did not seek a jury instruction that he could not recover for a preexisting disability. Rather, they argued that the December 2006 surgery was not connected at all to the March 30, 2006 accident. There was considerable basis for the jury to reach that conclusion. The photographs show a low-impact accident. Sweers initially reported he was okay, and told his mother he "didn't know if he was hurt." It is somewhat difficult to understand how Sweers could have injured his right shoulder in this type of accident. Furthermore, in the emergency room no evidence of a recent right shoulder injury was detected, only the old injuries that had been treated in 2003 and 2004. A jury also could have had questions about Sweers's credibility. His later claims of having been "T-boned" by a vehicle going twenty to thirty miles an hour appear inconsistent with the photographs.

Greenwood, a case about an alleged failure to mitigate damages, is not on point either. In *Greenwood*, the supreme court emphasized that failure to mitigate is an affirmative defense, as to which the defendant bears the burden of proof. Accordingly, a failure to mitigate instruction should not be given unless the defendant presents the same kind of proof that would be sufficient to meet the plaintiff's initial burden of establishing a causal connection between the defendant's conduct and his or her own injuries. 621 N.W.2d at 205-07. But there was no mitigation issue in this case. The only issue here was the extent to

which the defendant's conduct caused Sweers's injuries, an issue as to which Sweers always bore the burden of proof.

In short, neither *Sleeth* nor *Greenwood* bar the defendant from introducing evidence of the plaintiff's prior conditions. "[E]vidence of prior injuries would clearly be admissible to show the extent, if any, to which they contribute to the plaintiff's present complaints. . . ." *Nepple v. Weifenbach*, 274 N.W.2d 728, 732 (Iowa 1979); *see also Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 893-94 (Iowa 1996) (rejecting argument that defendant should bear the burden of proof in establishing preexisting conditions or showing that plaintiff's injuries were caused by those preexisting conditions); *Johnson v. Knoxville Cmty. Sch. Dist.*, 570 N.W.2d 633, 640 (Iowa 1997) (finding no abuse of discretion in admission of evidence concerning previous injuries).

B. Reference to Plaintiff's Insurance.

Sweers next claims the district court erred in admitting evidence that he went to the emergency room on the recommendation of his insurance agent. The entire sentence from the medical record reads, "21 yo m s/p low speed MVA ambulated at scene went home but insurance agent recommended he come in for a check up." We believe the trial judge did not abuse his discretion in admitting this evidence. We agree with the Westfalls that the evidence was probative because it went to the issue of how injured Sweers was. It also was used properly, at trial, to impeach Sweers's credibility when he claimed that was not the reason he went to the emergency room.

"It is clearly the general rule that in a personal injury or death action evidence is inadmissible which informs the jury that the defendant is insured

against liability." *Mihalovich v. Appanoose County*, 217 N.W.2d 564, 567 (Iowa 1974); *see also Price v. King*, 255 Iowa 314, 322, 122 N.W.2d 318, 323 (1963) ("We adhere to the long standing and well established rule that it is improper to suggest to the jury either directly or indirectly that the damages sued for are covered by insurance protecting against personal liability."). "There are, however, circumstances under which such evidence is admissible." *Mihalovich*, 217 N.W.2d at 567. Iowa Rule of Evidence 5.411 reflects this common law rule:

> Evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

That rule was not violated here. On direct examination, Sweers testified that after the car accident, "[e]very minute that went by my shoulder started feeling more and more pain." He stated he went to the emergency room that night "because I was seriously worried about what was wrong with my shoulder." On cross-examination, counsel for the Westfalls asked Sweers to examine the physician's notes from that emergency room visit:

> Q. Do you see there where it says that you had gone home but insurance agent recommended he come in for a checkup, that's what it reported there? A. That's what it says.

The Westfalls' counsel had highlighted this inconsistency in his opening statement to the jury, in which he asserted:

> The reason [Sweers] went [to the hospital] is because his insurance agent told him to get checked out, not because he was [w]rithing in pain or suffering terribl[y], but because he was asked to get checked, he thought it would be good to get checked out.

That theme was continued in counsel's closing argument:

> Exhibit C is the University of Iowa Hospital and Clinic records from the night of March 30 of 2006. . . . They say he was there because his insurance agent told him to get checked out, that his symptoms were mild, that it was a low-impact accident and importantly there was no evidence, no evidence of shoulder dislocation or fracture.

In support of our conclusion that the trial judge did not abuse his discretion in admitting evidence of Sweers's statement in the emergency room, we have the following additional observations:

First, jurors bring their common experiences to the courtroom. Certainly one of those common experiences is that motorists in the State of Iowa are required to and generally do carry insurance. Another of those common experiences is that when people are involved in a car accident, regardless of who is at fault, they frequently contact their insurance agent afterward. It is difficult to believe the admission of Sweers's statement altered the collective wisdom that this jury already had before trial commenced. *See, e.g.*, *Moose v. Rich*, 253 N.W.2d 565, 570 (Iowa 1977) ("Jurors are presumably aware of the facts of everyday life and insurance is certainly within the limits of such awareness."). Sweers could have requested a cautionary instruction on the subject of insurance had he been concerned about the potential for unfair inferences. In this case, he did not.

Also, to prevail on his argument, Sweers has to show prejudice. *Carter v. Wiese Corp.*, 360 N.W.2d 122, 130 (Iowa Ct. App. 1984). Absent a showing of prejudice, "the introduction of insurance coverage into a negligence suit will not be critical." *Id.*; *see also Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 874 (Iowa 1989) ("Although we recognize that it is generally improper for the subject of liability insurance to be raised before the jury, we do not presume

prejudice from every mention of insurance at trial."). In this particular case, we do not believe Sweers can show prejudice. The statement in question was just one tile in a much larger mosaic of evidence that indicated the accident was unlikely to have caused Sweers's shoulder injuries. Most significant, we believe, were the post-accident photographs of the two vehicles that showed a relatively minor collision.

Finally, while our dissenting colleague has a potential alternative suggestion for how this situation could have been handled, i.e., by admitting the substance of the statement but massaging it so the jury did not know the recommendation came from Sweers's insurance agent, that proposal was not made at the time. Sweers asked for exclusion of the evidence. He did not seek the evidentiary ruling now endorsed by our colleague. Thus, on this point, Sweers failed to preserve error.

IV. Conclusion.

The district court did not abuse its discretion in admitting the challenged evidence. We accordingly affirm the judgment of the court.

AFFIRMED.

Vaitheswaran, P.J., concurs; Doyle, J., concurs in part and dissents in part.

DOYLE, J. (concurring in part and dissenting in part)

I concur with the majority's opinion regarding the admissibility of Sweers's preexisting condition, but I respectfully dissent from the majority's opinion regarding the references at trial to Sweers's insurance.

We have adhered "to the long standing and well established rule that it is improper to suggest to the jury either directly or indirectly that the damages sued for are covered by insurance protecting against personal liability." *Price v. King*, 255 Iowa 314, 322, 122 N.W.2d 318, 323 (1963). As pointed out by the majority, this common law rule is reflected in Iowa Rule of Evidence 5.411, which deems liability insurance inadmissible upon the issue of whether a person acted negligently or otherwise wrongfully. The rationale for the rule has been founded upon three reasons: (1) the evidence is ordinarily irrelevant to any issue in the case; (2) it tends to influence jurors to bring in a verdict against a defendant on insufficient evidence; and (3) it causes jurors to bring in a larger verdict than they would if they believed the defendant would be required to pay it. *Laguna v. Prouty*, 300 N.W.2d 98, 101 (Iowa 1981). It has been held that it is "likely that evidence of insurance will cause the jury to return a larger verdict against [a defendant] then it would have if it were unaware that insurance existed and the amounts thereof." *Handley v. Farm Bureau Mut. Ins. Co.*, 467 N.W.2d 247, 250 (Iowa 1991). Who is to say that the converse is not true? Evidence of plaintiff's liability insurance may cause the jury to return a smaller verdict than it would have if it were unaware that the insurance existed, particularly when evidence of defendant's insurance is excluded. In any event, the evidence is ordinarily irrelevant to any issue in the case.

Sweers's underinsured carrier, Grinnell Mutual Reinsurance Company, was severed from the suit pursuant to a *Handley* motion. Westfalls filed a motion in limine to exclude evidence they were covered by liability insurance. Had Sweers mentioned at trial that Westfalls were covered by liability insurance, I have no doubt an immediate call for mistrial would have been made. What is good for the goose is good for the gander. Counsel for the Westfalls should not have been allowed to indirectly suggest at trial that Sweers was covered by insurance. Although the fact that Sweers sought medical treatment at the suggestion of another may have been relevant to the issues at trial, the fact that the person was Sweers's insurance agent was not. Nevertheless, the trial court overruled Sweers's request that Westfalls not introduce any evidence as to the Sweers's seeking of medical care at the suggestion of his insurance agent. In so ruling, the trial court did express some concern about allowing the evidence in by remarking, "It certainly is the court's hope that any references to insurance really just go quickly and I really don't think anyone wants there to be any dwelling on that at all." Despite this concern, repeated references to Sweers's "insurance agent" were made during trial by counsel for the Westfalls. References were made during his opening statement, during his examination of Sweers, during his examination of Sweers's treating physician, through medical record exhibit C, and during his closing argument. Reference to the person as Sweers's "insurance agent" was unnecessary and could have easily been avoided by referring to the person in another way. By the person's name perhaps?